IN THE HIGH COURT OF JUDICAUTRE AT MADRAS

Dated : 07.11.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUTICE CHITRA VENKATARAMAN

Writ Appeal No.1191 of 2002

1. The Assistant Commissioner of
   Central Excise,
   Madras I Division,
   621, Mount Road,
   Chennai 600 006.

2. The Commissioner of Central Excise (Appeals),
   121, Nungambakkam High Road,
   Chennai 600 034. Appellants

v.

1. The Customs, Excise and Gold (Control)
   Appellate Tribunal, represented by
   its Assistant Registar,
   26, Haddows Road, Chennai 600 006.

2. Tamil Nadu Petroproducts Ltd.,
   No.6, Nungambakkam High Road,
   Chennai 600 034. Respondents

Writ Appeal filed under clause 15 of the Letters Patent against the order of the learned single Judge of this Court dated 20.11.2001 made in writ petition No.5049 of 2001, filed under Article 226 of the Constitution of India to call for the records on the files of the Third Respondent herein in Order No.3352/97 (Appeal No.E/17/96/Md.), dated 23.12.1997 along with the orders of the Second Respondent herein in his Order in Appeal No.234/95 (M) (A.No.284/95 (M) dated 22.11.1995 and that of the First Respondent herein C.No.V/27/18/94/94 dated 05.09.1995, and issue a Writ of Certiorarified Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, quashing the Third Respondent's Order dated 23.12.1997 in Order No.3352/97 (Appeal No.E/17/96/Md) confirming the Order of the Second Respondent herein in his Order in Appeal No.234/95(M) (A.No.284/95(M) dated 22.11.1995 and direct that the mones due the Special Orders of the Government of India, Ministry of Finance, Department of Revenue,New Delhi in F.No.345/4/04-TRU, dated 10.11.1994, be restored to the petitioners herein.

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For Appellant : Mr.P.Wilson,
Assistant Solicitor General

For Respondent 2 : Mr.C.Natarajan, Senior Counsel, for
M/s. N.Inbarajan

JUDGMENT

K.RAVIRAJA PANDIAN, J.

The order of the learned single Judge dated 20.11.2001 made in writ petition No.5049 of 2000 directing the appellant herein to refund the excise duty in a sum of Rs.1,92,04,127/- which was disallowed by the Assistant Commissioner of Central Excise, Madras and confirmed by the authorities under the Central Excise Act on the ground that the claim made by the second respondent/assessee was barred by time for the month of March 1994, is put in issue in this appeal. For the sake of convenience, the parties to this appeal are referred to in the manner they were referred in the writ petition.

2. The material facts of the case proceed as follows :

The writ petitioner, a company incorporated under the Companies Act, 1956 and holder of Central Excise Registration Certificate for the manufacture of Linear Alkyl Benzene (In short, referred to LAB hereinafter) falling under Chapter Heading No.3817.00 of the Central Excise Tariff Act, 1985. Kerosene from which paraffin was extracted, the main raw material for the manufacture of LAB was drawn from the adjacent Madras Refineries Ltd. (In short, hereinafter referred to as MRL) by pipe line transfer basis. The petitioner extracted paraffin from the kerosene supplied by MRL which in turn was used for the manufacture of LAB. The kerosene so received by the petitioner after being subjected to the process of hydro-generation for extraction of paraffin was returned to MRL through another pipe line. The kerosene received back by MRL was supplied to the Indian Oil Corporation under bond without payment of duty. IOC sold the kerosene so received on payment of duty at the price applicable to kerosene supplied under the Public Distribution System.

3. During the relevant time, i.e., prior to the budget year 1994-95 in terms of Notification No.29/89-CE dated 01-03-1989 excise duty was chargeable on the net quantity of kerosene consumed in the extraction of paraffin. The quantity of kerosene returned by the petitioner to MRL was exempt from excise duty. The quantity of kerosene consumed in the manufacture of paraffin was calculated at 15% by subtracting from the quantity of kerosene received by the petitioner, the quantity of kerosene returned by the petitioner to MRL. Consequent upon the extension of MODVAT to petroleum products including kerosene, exemption Notification No.29/89-CE dated 01.03.1989 was rescinded by Notification No.64/96 CE dated 01.03.1994, thereby the petitioner was forced to pay excise duty for the entire quantity of kerosene received despite the fact 85% of the kerosene was returned back and made available for public

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distribution system on payment of excise duty by IOC..

4. The petitioner made several representations against the withdrawal of the exemption to the effect that because of the withdrawal of the benefit of the notification No.29 of 1989 dated 01.03.1989 excise duty became payable on the full quantity supplied by MRL to the petitioner which included the returned quantity of kerosene to MRL. Upon examining the possibility and having regard to the difficulties faced by the consumer, the Government restored the exemption by Notification No.116/1994 CE dated 24.06.1994. Thus, the position which was prevailing prior to 01.03.1994 was restored on and from 24.6.1994. But for the period from 01.03.1994 to 23.06.1994 the petitioner paid full incidence of excise duty on the kerosene received from MRL in spite of the fact that 85% of the total quantity has been returned back to MRL. Hence, the petitioner and MRL have represented to the Government that in as much as the returned kerosene was cleared on payment of the appropriate duty by the Indian Oil Corporation, the returned quantity of kerosene becomes subjected to excise duty twice, i.e., once when received from MRL and again when cleared by the Indian Oil Corporation under Public Distribution System and the petitioner consumed only 15% of the kerosene for extraction of paraffin it would be unbearable for them if the duty was to be borne by them on the entire quantity of kerosene received. In addition to the representation, the petitioner also filed a claim for refund to the Assistant Commissioner claiming refund of the amount of the excise duty paid by MRL the incidence of which has been passed on to the petitioner on the quantity of kerosene returned back to MRL. Having regard to the circumstances stated above and in particular the fact that the returned quantity of kerosene has ultimately been cleared on payment of appropriate duty by IOC, the Central Government got satisfied that the burden of excise duty on the returned quantity of kerosene has fallen on the petitioner which was much more than excise duty payable on the quantity of kerosene actually consumed by them.

5. Accordingly, having regard to the circumstances of the exceptional nature and in exercise of the power conferred by sub section (2) of section 5A of the Central Excise and Salt Act, 1944, the Central Government being satisfied that it was necessary in the public interest so to do, by an order, exempted the quantity of kerosene falling under the heading No.27.10 of the Schedule to the Central Excise and Tariff Act, 1985 supplied by MRL to the petitioner during the period from 01.03.1994 to 23.06.1994, intended for use in the manufacture of LAB from so much of the duty of excise leviable thereon as is in excess of duty leviable on the quantity of kerosene consumed for the manufacture of LAB. The Government also indicated in the exemption order that the quantity of kerosene consumed in the manufacture of paraffin should be calculated by subtracting from the quantity of kerosene received by the petitioner, the quantity of kerosene returned back. Further, the authorities under the Central Excise Act were directed to consider the refund application filed by the petitioner in the light of the exemption contained in the adhoc exemption order subject to the provisions of Section 11B of the Act and also subject to the condition that no credit of duty paid on the quantity of kerosene supplied by MRL to the

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petitioner during the period from 01.03.1994 to 23.06.1994. The said adhoc exemption order was passed on 10.11.1994.

6. Even prior to the passing of the order dated 10.11.1994, when the representations were pending consideration, on the hope that the Government would positively consider its case, the petitioner filed the refund application on 28.09.1994 for a sum of Rs.8,29,43,110/- for the period from 01.03.1994 to 23.06.1994 to the Assistant Commissioner of Central Excise. That application dated 28.9.1994 was taken up for consideration after the order dated 10.11.1994 was passed. The Assistant Commissioner has granted the refund barring a sum of Rs.1,92,04,127/- pertaining to the month of March, 1994 on the ground that the claim in respect of that month was barred by the period of six months contemplated under section 11-B of the Central Excise and Salt Act, 1944 on 20.01.1995. That order was carried on appeal to the Commissioner of Central Excise. The Commissioner by his order dated 18.04.1995 remitted the matter back to the Assistant Commissioner of Central Excise, as there was no detail in the order of the Assistant Commissioner as to how he considered the claim as time barred, as to what was the relevant date from which the limitation was reckoned and as to whether the duty has been paid under protest or not.

7. The Assistant Commissioner by his order dated 05.09.1995 has confirmed his original order on the ground that the date of payment of duty by consignor MRL was taken as the relevant date under section 11B of the Act. On further appeal, the Commissioner of Central Excise by order dated 22.11.1995 confirmed the order of the Assistant Commissioner on the premise that the relevant date could only be the date of payment of duty in terms of sub-clause (f) of Explanation B to Section 11-B of the Act, which order was confirmed by the CEGAT by order dated 23.12.1997.

8. The petitioner not satisfied with the order of CEGAT made an application for reference of question of law to this Court in Reference Application No.46/1998 which has been dismissed on 03.06.1999. The petitioner filed writ petition No.5049 of 2000 challenging the order of the Assistant Commissioner confirmed by the appellate authority including that of the CEGAT non suiting the petitioner for refund for the month of March 1994 and writ petition No.5050 of 2000 against the rejection of the reference application by the CEGAT.

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9. The learned single Judge by his order dated 20.11.2001 allowed the writ petition No.5049 of 2000 on the ground that only on 10.11.1994 the Government passed exemption order for the period from 01.03.1994 to 23.06.1994. Unless such exemption was granted the petitioner was not entitled for refund though it made a claim on 28.09.1994. So the finding of the authorities that the application made on 28.09.1994 was beyond the period contemplated under section 11B of the Act could not be sustained. By so holding the learned single Judge set aside the orders impugned therein and allowed the writ petition. The other writ petition in W.P. No.5050 of 2000 was dismissed as unnecessary in view of the order made in W.P.No.5049 of 2000. The department has filed this

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writ appeal against the order of the learned single Judge on 20.11.2001 made in writ petition No.5049 of 2000.

10. The learned Additional Solicitor General assailed the order by contending inter alia that though the exemption order dated 10.11.1994 was made under Section 5A(2) but subject to section 11B of the Act. Therefore, before ordering any refund, two things have to be satisfied. Those are – (1) question of limitation and (2) that the incidence of duty has not been passed on to any other person. The learned single Judge failed to consider the second question of unjust enrichment. He further contended that the statutory period prescribed under section 11B has been totally overlooked by the learned Judge. The refund application was filed on 28.09.1994. As per Section 11-B, any refund application has to be made before the expiry of six months from the relevant date. Hence, for the period of March 1994, the refund claim is barred by limitation. It was further contended that the sub-clause (ea) of Explanation B to section 11B(5) was incorporated in the Act only on 28.09.1996 which cannot be made applicable to the case of the petitioner. If sub-clause (ea) is to be applied to the case of the petitioner it would tantamount to giving retrospective effect to the provision when no such effect has been given to that clause.

11. On behalf of the writ petitioner it was contended that the claim of refund of duty paid for the month of March 1994 has been rejected on the ground of limitation alone after enquiring into all aspects. The explanation offered by the petitioner that there was no unjust enrichment on the part of the petitioner as the incidence of duty liability has not passed on nor was credit of duty availed has been accepted by all the authorities concerned. Hence the contention that the learned Judge has not enquired into the point of unjust enrichment has no merit consideration. In the absence of any definition or clarification in respect of the term "relevant date" with reference to the special order issued under Section 5A(2) of the Act, the date of such order alone could be taken as relevant date. He further contended that clause (ea) in Explanation B to section 11B (5) is an affirmation of certain earlier Tribunal decisions which had held that the statutory limitation under Excise or Customs Act is not applicable to the special orders issued under section 25(2) of the Customs Act or Rule 8(2) or 5A (2) of the Central Excise Act. The amendment so incorporated is declaratory and explanatory and consequently retrospective and remedial. The insertion of clause (ea) to Explanation B of Section 11B(5) indicates the same and as such the same has to be regarded as curing of the obvious omission in the statute. Hence the petitioner could not be denied refund of duty for the month of March, 1994. Alternatively it was contended that the second proviso excludes the limitation of six months where any duty is paid under protest. After rescinding of the notification No.29/89 dated 01.03.1999, the petitioner addressed the Commissioner of Central Excise for continuation of the then existing procedure and sought for his intervention by expressing hardship experienced by the petitioner. The Assistant Commissioner of Central Excise in his order dated 05.09.1995 has admitted that even after 01.03.1994 MRL remitted duty at 15% of the total quantity for the month of March 1994 thereby implying that the liability as per the amendment

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was protested and not met. Though the Commissioner of Central Excise (Appeals) in his order dated 22.11.1995 stated that the duty in a sum of Rs.1.94 crores was paid without any protest in terms of Rule 233B, the correspondence with the Government would amply prove that the amount has been paid under protest only.

12. We heard the learned counsel on either side and perused the materials available on record.

13. From the above contentions, the points that arise for consideration in this case are as follows :

1. Whether the petitioner unjustly enriched because of the refund and thereby rendering itself not entitled to refund as provided under Section 11-B of the Act?
2. Whether in the facts and circumstances of the case, the payment of the excise duty made by the petitioner would amount to payment under protest thereby proviso to section 11B of the Act would get attracted to the case?
3. Whether the payment of duty in respect of the month of March 1994 is hit by limitation prescribed under section 11B of the Act?

14. Point No.1 : The Assistant Commissioner of Central Excise by his letter dated 22.11.1994, with reference to the refund application of the writ petitioner dated 28.09.1994 sought for certain clarifications. One of the clarifications the Assistant Commissioner sought for from the petitioner was the detail regarding the quantity, value and duty of SKO, which has gone or which goes into the manufacture of one metric tonne of LAB and the price and assessable value of LAB prior to 01.03.1994. That clarification has been sought for only to have the details as to whether the incidence of duty has been passed on to the ultimate consumer of LAB. In the reply dated 24.11.1994, the petitioner has informed the Assistant Commissioner the details of the cost of production of LAB. The petitioner without any uncertain terms informed the Assistant Commissioner that the incidence of duty has not been passed on to the customers. For the sake of convenience, the relevant portion is extracted below :

> "We enclose herewith the cost of production of LAB for your reference which shows that the incidence of duty has not been passed on to the customers."

Thereupon, after consideration of all the details furnished by the petitioner, the Assistant Commissioner of Central Excise by his order dated 20.01.1995 has refused to grant the refund for the month of March 1994 on the ground that the claim for the said month was barred by limitation under section 11B of the Central Excise Act. On appeal, the Commissioner has set aside the order and remitted the matter back to the Assistant Commissioner on the premise that in the order, the Assistant Commissioner did not state as to how he considered the claim as time barred and what was the date which was taken as relevant date and whether the duty has been paid under protest or not.

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15. The subsequent order of the Assistant Commissioner dated 5.9.1995 confirming his earlier order, the appellate order of the Commissioner dated 22.11.1995 and Tribunal order dated 23.12.1997 were all only concentrated on the point of limitation. Even before the learned single Judge, the point of unjust enrichment has not been put forth by the Department. Obviously, because all the authorities under the Act had accepted the explanation offered by the petitioner that the incidence of duty has not passed on by the petitioner. When the explanation so offered by the petitioner was accepted and not been disputed by any of the authorities below and even before the learned Single Judge it was not disputed, it is not correct on the part of the appellant to contend that the question of unjust enrichment has not been considered by the learned single Judge. Hence, the contention of the counsel for the Department that the learned single Judge has not taken into consideration the aspect of unjust enrichment as stated in the larger Bench decision of the apex Court in the case of Mafatlal Industries Ltd. v. Union of India, 1997 (89) ELT 247 (SC) would not hold good. Hence, this contention is rejected.

16. Point No.2: The second proviso to Section 11B(1) reads as follows:

> "Provided further that the limitation of six months shall not apply where any duty has been paid under protest."

The Commissioner by his order dated 18.4.1995 while setting aside the original order and remitting back the matter, has directed the original authority to record a finding whether the duty has been paid under protest or not. The Assistant Commissioner by his order dated 05.09.1995 recorded a finding that neither the consignor MRL nor the petitioner have proved with sufficient records that the duty was paid under protest as contemplated under Rule 233B. In the second round of appeal before the Commissioner also, the petitioner has raised a plea that the entire amount has been paid under protest though the procedure as contemplated under Rule 233B has not been strictly followed which is evident from paragraph 3 of the Commissioner's order dated 22.11.1995. However, the Commissioner, without going into that aspect of the matter in detail with reference to materials, simply confirmed the order of the Assistant Commissioner by observing that the payment of duty on 21.3.1994 by MRL could not also be considered as payment under protest in terms of Rule 233B.

17. On reading of adhoc exemption order, it is evident that the petitioner has made repeated representations for the restoration of the exemption notification which could be seen from paragraph 3 of the order which reads thus:

> "Representations were received against the withdrawal of exemption. It was represented that in the absence of exemption contained in notification No.29/89-CE, Excise duty became leviable on the full quantity of kerosene supplied by MRL to TPL. ..... On examining these representations and having regard to the difficulties faced by the concerned consumers the Government decided to restore the exemption. ...."

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Paragraph 4 of the adhoc exemption order proceed as follows:

> "It has, however, been represented to the Government that TPL became liable to bear the full incidence of excise duty on kerosene received during the interim period, namely, during the period from 01.03.1994 to 23.06.1994. It has also been represented that the returned kerosene in any case was cleared on payment of appropriate duty by Indian Oil Corporation. In the circumstances, the quantity of the returned kerosene became subjected to excise duty twice – once while received from MRL by the petitioner and again when cleared by the Indian Oil Corporation under Public Distribution System. "

Paragraph 5 reads thus:

> "TPL has represented that they consumed only about 15% of the kerosene received for the extraction of paraffin and it would be unbearable for them if the duty is to be borne on the entire quantity of kerosene received."

In paragraph 6 of the exemption order also, the Government has stated that having regard to the circumstances mentioned above, and particularly the fact that the returned quantity of kerosene had ultimately been cleared on payment of duty by Indian Oil Corporation, the Central Government was satisfied that the burden the excise duty on the returned quantity of kerosene which was originally supplied by MRL to the petitioner at a price for industrial use has fallen on the TPL, which is much more than the excise duty payable on the quantity of kerosene actually consumed by them.

18. Though the Department has taken a stand that the duty has not been made under protest, however, in their counter filed in the writ petition, consciously, they themselves accepted that the petitioner was forced to pay the duty.

19. Now let us consider whether the above referred to statement of the petitioner could be treated or constituted as payment made under protest as required under law. In the case of India Cements Ltd. v. Collector of Central Excise, 1989 (41) ELT 358 (SC) , the Supreme Court had an occasion to consider what would amount to payment of duty under protest. A letter written by the manufacturer of the excisable goods to the effect that if the department felt that the duty was leviable on the packaging charges, the assessee had no option but to suggest that the rates be fixed by the Government of India from quarter to quarter as packaging charges was regarded by the Supreme Court as payment made under protest. In the words of the Supreme Court (at paragraph 10) :

> "We gave our anxious consideration to the rival submissions. A perusal of the letter dated June 11, 1974 clearly shows that all possible contentions which could be raised against the levy of duty on the value of packing material were raised If this could not be said to be a protest one fails to understand what else it could be. It does not require much time to analyse the contents of the letter. An ordinary reading with common sense will reveal to anybody that the appellant was not accepting the liability without protest. We have no hesitation to hold that the

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letter was in the nature of protest. That being the position, the question of limitation does not arise for refund of the duty."

20. The issue as to whether the non observance of the procedure as contemplated under Rule 233B can negate the claim of the petitioner for refund, has also been considered by a Division Bench of this Court in the case of CCE v. ITC Ltd., 2005 (185) ELT 114 (Mad). The Division Bench, after taking into consideration paragraphs 93 and 94 of the decision of the Constitution Bench in the case of Mafatlal Industries Ltd. v. Union of India, 1997 (89) ELT 247 (SC) opined that those paragraphs did not help the department. The observation in that paragraph –"any person paying the duty under protest has to follow the procedure prescribed by the rule did not mean that Rule 233B could be construed in a narrow, pedantic or hyper technical manner. The Division Bench further opined that Rule 233B, as interpreted by the decision of the Supreme Court, referred to above, would only mean that substantially there has to be protest in writing. After extracting Rule 233B of the Central Excise Rules in paragraph 14 of the judgment the Division Bench has held that in the opinion of the Division Bench Rule 233-B could not control full effect of the proviso to section 11B(1). It further observed that a rule made under the Act could not limit a provision in the Act itself and it was well settled that a rule made under an Act would not be valid if it conflicts with or is in derogation to a section of the Act vide CIT v. S.Chinnappa Mudaliar, AIR 1969 SC 1068 and ultimately held that the Rule should not be construed in a manner that it conflicts with a section of the Act.

21. In the given set of facts, the Division Bench has taken note of the decision of the Supreme Court in the case of India Cements Ltd v. Collector of Central Excise, 1989 (41) ELT 358 and extracted that portion of the order which we have referred to earlier. The Division Bench also referred to the decision of the Supreme Court in the case of India Pistons Ltd. v. Union of India, 1990 (46) ELT 3 (SC) and referred to the following observations of the Supreme Court that the Rule 233B of the Central Excise Rules did not prescribe any particular form of protest :

"18. In Executive Engineer Workshop Division, MP Electricity Board v. C.C.E., Raipur, 1997 (94) ELT 445, the facts were that the Inspector of Central Excise wrote a letter to the Divisional Engineer, Central Workshop of the Electricity Board stating that since the factory of the Electricity Board had not yet been licensed under the Central Excise Act and Rules to manufacture the said goods the Divisional Engineer at the Central Workshop was requested to supply the particulars in respect of the goods manufactured in the factory. The said details was sought in order to enable the excise authorities to recover the Excise Duty on the goods that were being manufactured in the Central Workshop which according to him were liable for payment of Excise duty. In reply to the said letter, the Divisional Engineer, Central Workshop, in his letter dated 30.11.1975 took the stand that the Central Workshop at Bhilai was undertaking the fabrication of transmission line towers and the sub-station structures and

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Line Hardware materials in connection with the power supply in the State of Madhya Pradesh and that the provisions of the Central Excise Rules regarding obtaining licence and payment of Excise duty may not be applicable to the Central Workshop. On these facts, the Supreme Court observed :

> A narrow interpretation of the said letter would give the impression that the Divisional Engineer was only lodging his protest against obtaining a licence. But, in our opinion, the said letter has to be read as a whole in the context in which the requirement for obtaining licence was being insisted, namely, that the goods manufactured at the Central Workshop were leviable to excise duty under Tariff Item 68, which liability was disputed by the Divisional Engineer. The letter of the Divisional Engineer dated 30-11-1976 must therefore be construed to mean that protest was lodged in the said letter both against obtaining the licence as well as against liability to payment of excise duty. In these circumstances we are unable to agree with the Tribunal that payment of duty was not made under protest. On that view of the matter the impugned judgment of the Tribunal cannot be upheld and has to be set aside."

22. If we apply the ratio of the above cases to the facts of the present case, particularly, the statements extracted supra from the exemption order, we are of the considered view that the payments were made only under protest. Borrowing the words of the Supreme Court, if these letters could not be said to be a protest, one fails to understand what else they could be?

23. An argument is sought to be raised that the point as to payment of duty under protest has not been argued before the learned single Judge. Hence, that issue cannot be now pressed into service in this appeal. We are not able to accept this plea. As stated supra, by his order dated 20.1.1995 the Commissioner originally remanded the matter to the Assistant Commissioner among other things to record a finding whether the duty has been paid under protest or not. The Assistant Commissioner by his order dated 5.9.1995 recorded a finding to the effect that MRL has discharged duty only on anticipated consumption of TPL i.e., 15% of the total quantity of SKO supplied by MRL to TPL. Hence, TPL would not be eligible for refund for the month of March 1994 during which period MRL paid duty only on 15% of the total quantity despatched by them to TPL. Only non duty paid quantity has been returned from TPL back to MRL during the month of March, 1994. The Commissioner (Appeals) by his order dated 22.11.1995 has recorded a finding to the effect that the Assistant Commissioner has complied with all the directions although he had erred factually in observing that during March 1994 duty was paid only on 15% of kerosene supplied to MRL ignoring the fact that on 21.8.1994 further duty liability on the remaining 85% was discharged by MRL by paying a lump sum of Rs.1.94 crores. Even in the counter filed in the writ petition, it has been averred by the Department that the petitioner was forced to pay the amount. It is true that before the learned single Judge, the parties

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were only concentrated on the point of limitation, though the point of payment of duty under protest was available in the records. Hence, there was no occasion for the learned single Judge to consider the issue. Further, it is very well settled and established proposition of law that if a plea though not specifically raised before the subordinate tribunals or the administrative and quasi-judicial bodies, is raised before the High Court and if the plea goes to the root of the dispute and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the court, it is only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved. The aforesaid view has been taken by the Supreme Court in a number of decisions, a few of which are A. St. Arunachalam Pillai v. Southern Roadways Ltd., AIR 1960 SC 1191; Cantonment Board, Ambala v. Pyarelal , AIR 1966 SC 108 and Rattan Lal Sharma v. Managing Committee, Dr Hari Ram (Co-Education) Higher Secondary School, AIR 1993 SC 2155 = (1993) 4 SCC 10. In a latest decision of the Supreme Court on this point it was held that a plea abandoned before a single Judge in a High Court could be raised before a Division Bench. Such plea is not barred by estoppel because the writ appeal is in continuation of the original order passed by the single Judge in writ jurisdiction., vide Bongaigaon Refinery & P.C. Ltd. v. Girish Chandra Sarmah, (2007) 7 SCC 206 = 2007 AIR SCW 5185. Therefore, we are of the considered view that the payment of duty made by the petitioner in respect of the disputed period was made only under protest and as such the second proviso to Section 11B would definitely get attracted and on that score, the order of the authorities including that of the Tribunal non-suiting the petitioner for refund in respect of March 1994 is not in accordance with law.

24. Point No.3: As we have come to the conclusion that the petitioner paid the duty for the disputed period only under protest, as such the period of limitation prescribed would not apply as per the second proviso to Section 11B of the Act, this point i.e., the claim of refund for the month of March 1994 is barred by limitation or not is paled in thin air and requires no further consideration in our view. We are conscious of the fact that the learned single Judge has granted the relief to the petitioner by holding that the period of limitation has to be reckoned from the date of adhoc order. Even assuming for a moment that we are taking a contrary view on this point by holding clause (f) of Explanation B to Section 11B as it stood during the relevant time was a residuary clause encompassed within it all other contingencies which are not stated in clauses (a) to (e), the result of this case would be no different than one of dismissal, , as the claim of the petitioner cannot be denied for the reasons stated in point No.2.

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25. In view of the foregoing discussion, the writ appeal is dismissed. However, there is no order as to costs.

mf

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Assistant Registrar
Customs, Excise and Gold (Control)
Appellate Tribunal,,
26, Haddows Road, Chennai 600 006.

2. The Commissioner of
Central Excise (Appeals),
121, Nungambakkam High Road,
Chennai 600 034.

3. The Assistant Commissioner of
Central Excise,
Madras I Division,
621, Mount Road,
Chennai 600 006.

+1 cc to Mr.N.Inbarajan, Advocate Sr.No.66662.

+1 cc to Mr.P.Wilson, A.S.G.I. Sr.No.66815.

KA(CO)
dcp/21.11

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